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No. 79-951

In the Supreme Court of the United States

OCTOBER TERM, 1979

DONNA J. WOODSIDE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, petitioner contends that the district court and the court of appeals erroneously held that the injury to the decedent occurred in the course of "activity incident to [military] service" within the meaning of *Feres* v. *United States*, 340 U.S. 135, 146 (1950).

On April 19, 1973, Air Force Captain Henry Schroeder, petitioner's husband, was killed while tak-

ing flight instruction for a civilian pilot's license from a civilian employee of the Hickman-Wheeler Air Force Base Aero Club, a flight club sponsored by the Air Force (Pet. App. 18a-19a).[1] Schroeder was on leave at the time of the crash (*id.* at 18a). The district court dismissed petitioner's FTCA suit on the ground that "an active-duty serviceman killed while training in an Aero Club plane under the direction of a civilian employee of such a club is involved in activity incident to military service within the meaning of the *Feres* doctrine" (*id.* at 23a).[2] The court of appeals affirmed in a thorough opinion on which we substantially rely (*id.* at 3a-17a).

Petitioner contends that there is a conflict among the circuits concerning the meaning of the phrase "incident to service." Significantly, however, every appellate decision cited by petitioner denied FTCA recovery (Pet. 5-9). Although it is true that different factors were considered in these cases in determining that the activity was incident to military service, the differences reflect only the varying circumstances of the accidents. Petitioner points to no conflicting deci-

[1] The Aero Club is a non-appropriated fund instrumentality of the United States, operated under the auspices of the Air Force (Pet. App. 4a & n.1). See 32 C.F.R. 984 *et seq.* Schroeder was an "active member" of the Club, a status available only to active duty personnel of the United States Air Force (see Pet. App. 5a). Schroeder was taking flight instruction for personal reasons and not as part of his military duties (*id.* at 18a-19a).

[2] The *Feres* rule was recently reaffirmed in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977).

sions among the courts of appeals on similar facts.[3] Nor does petitioner cite any decision of a court of appeals allowing recovery under circumstances similar to the present case.

The decision below is correct. As the court of appeals noted (Pet. App. 16a), the lower courts have consistently held that where the military provides the opportunity for or is substantially involved in an activity engaged in by a soldier on leave, the activity will be considered "incident to military service" even if it is not essential to the mission of the service. See *Hass* v. *United States*, 518 F.2d 1138, 1141-1142 (4th Cir. 1975); *Chambers* v. *United States*, 357 F.2d 224, 229 (8th Cir. 1966); *Keisel* v. *Buckeye Donkey Ball, Inc.*, 311 F. Supp. 370 (E.D. Va. 1970). Here, the two lower courts correctly found that the Air Force was substantially involved in the Aero Club activity.[4]

[3] The only conflicting decisions cited by petitioner stem from *Brown* v. *United States*, 99 F. Supp. 685 (S.D. W.Va. 1951), which is of dubious authority in light of subsequent decisions of the courts of appeals, especially *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966). The factual circumstances in those two cases are dissimilar from those presented here.

[4] As the court of appeals stated (Pet. App. 16a-17a):

> By virtue of his service in the military, Captain Schroeder was able to gain membership in the Hickman-Wheeler Aero Club. The Club is a non-appropriated fund activity of the Air Force, established to promote the morale of service members. 32 C.F.R. § 984.1. The base commander has overall responsibility to supervise the activities of the Club. 32 C.F.R. § 984.2. The Club must have a Board of Governors which has a voting majority of active duty military personnel. 32 C.F.R. § 984.3. Moreover, the Board must keep minutes and submit them through the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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chief of special services to the base commander for approval. *Id.*

Although not supported by direct congressional appropriation, the Club's activities are supported indirectly by the Air Force in that the Club uses facilities at Wheeler Air Force Base and purchases its fuel through the Air Force. The Club is required, by Air Force regulation, to maintain certain records, 32 C.F.R. § 984.14, impose pilot maneuver restrictions, 32 C.F.R. § 984.17, require minimum flight times to maintain currency, 32 C.F.R. § 984.20, and follow a definite and standardized training program, 32 C.F.R. § 984.21. We find this relationship between the Club and the Air Force to be direct and substantial, even though the Club is not an essential or integral part of the military mission of the Air Force.

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